No. 87-636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EFTHIMIOS A. KARAHALIOS,

Petitioner,

v.

DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, PRESIDIO OF MONTEREY, and LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether a federal employee whose exclusive bargaining representative has violated its duty of fair representation may bring a claim for damages in federal district court; or, is his exclusive remedy to file an unfair labor practice charge with the Federal Labor Relations Authority?

LIST OF PARTIES

The plaintiff-petitioner in this case is Efthimios A. Karahalios.

The defendant-respondent in this case is Local 1263, National Federation of Federal Employees. An additional defendant below, Defense Language Institute/Foreign Language Center, Presidio of Monterey, is not a party which has an interest in the outcome of this petition.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The district court denied union motions to dismiss on jurisdictional grounds, reported at *Karahalios v. Defense Language Inst.*, 534 F. Supp. 1202 (N.D. Cal. 1982) (*Karahalios I*), and *Karahalios v. Defense Language Inst.*, 544 F. Supp. 77 (N.D. Cal. 1982) (*Karahalios II*). Joint Appendix ("JA") at 48 and 69. After trial, the district court entered judgment in favor of petitioner, reported at *Karahalios v. Defense Language Inst.*, 613

F. Supp. 440 (N.D. Cal. 1984) (*Karahalios III*). JA at 80. The opinion of the Court of Appeals for the Ninth Circuit which dismissed this case on jurisdictional grounds is reported at 821 F.2d 1389 (9th Cir. 1987), and was reproduced in Appendix A to the petition for certiorari ("Pet.App.") at 1a.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The petition for certiorari was filed on October 7, 1987, within ninety (90) days after the entry of the decision of the court of appeals, pursuant to 28 U.S.C. § 2101(c) and Rule 20.2, Rules of the United States Supreme Court. Certiorari was granted June 6, 1988. 108 S. Ct. 2032 (1988).

STATUTORY PROVISIONS INVOLVED

This case involves the general federal question jurisdiction statute, 28 U.S.C. § 1331, and Title VII of the Civil Service Reform Act of 1978 (Federal Service Labor-Management and Employee Relations Statute) ("CSRA"), 5 U.S.C. §§ 7101 *et seq.*, particularly 5 U.S.C. §§ 7114(a)(1), 7116, 7118 and 7123.

These statutes are set forth in the appendix to this brief.

STATEMENT OF THE CASE

Petitioner Efthimios Karahalios has worked for the federal government for many years. JA at 80, 82. Karahalios, who was not a union member, was part of a bargaining unit for which respondent Local 1263 of the National Federation of Federal Employees (the "union") was the exclusive bargaining representative. JA at 81. The collective bargaining agreements between the union and

the federal employer provided for an exclusive grievance procedure. The grievance procedure provided that only the union or the employer, but not the employee, could invoke arbitration. JA at 20, 26, 29 and 34.

In 1976, Karahalios was a Greek language instructor at the Defense Language Institute/Foreign Language Center, Presidio of Monterey (the "employer-agency"), in Monterey, California. JA at 82. During the many years that Karahalios had worked for the employer-agency, his work had been highly praised. JA at 82.

When a higher position (course developer) with substantially higher pay and prestige became available, Karahalios went through the competitive civil service selection process, and was promoted to course developer. JA at 82.

Karahalios performed satisfactorily as a course developer for almost a year. JA at 85. In the interim, another employee, Simon Kuntelos, filed a grievance alleging that he should have been given the course developer job without going through the competitive selection process. JA at 83. Kuntelos' grievance was denied by the employer-agency. *Id.* Kuntelos (a union board member[1]) requested that the union arbitrate his grievance. *Id.*

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[1] According to the district court's decision on the merits, the evidence arguably suggested that the union's decision to arbitrate on behalf of Kuntelos (the union board member) was based on a bad-faith policy of favoring union supporters over nonunion members of the bargaining unit. In addition to the fact that Kuntelos was a union board member and Karahalios was not even a union member, the district court noted that Kuntelos had offered to donate money to the union if he prevailed in arbitration. Further, the union had a history of chastising the employer-agency for failing to promote more union employees. Given that there was sufficient evidence of numerous violations of the duty of fair representation, the district court believed it unnecessary to rely upon the above facts in reaching its decision. JA at 83.

The union decided to arbitrate for Kuntelos without giving Karahalios notice that it was considering doing so, without considering Karahalios' qualifications for the job, and without taking into account the effect which the arbitration might have on Karahalios' position. JA at 83-84. When the Kuntelos arbitration took place, the union failed to give Karahalios notice of the hearing, or any opportunity to be present. Karahalios thus had no opportunity to present his views to the arbitrator. JA at 84. Even though Karahalios was not a party to the arbitration, had not been given notice of the hearing, and was not present at the hearing, the arbitrator ruled in favor of Kuntelos. The effect of the arbitrator's ruling was that Karahalios' position should be "reconstituted"; *i.e.*, Kuntelos should be permitted to go through the competitive selection process for Karahalios' position. JA at 84.

Kuntelos then went through the competitive selection process, but under radically different conditions than Karahalios. Kuntelos was tested almost a year after Karahalios. Kuntelos was the only one being tested, which meant that the graders were aware of whose test was being graded. JA at 84-85. Even though Karahalios was given only two hours to take the test, Kuntelos was given a full three-and-one-half hours to take the test, almost twice as long. *Id.* Karahalios was not given an opportunity to take the test at the same time and under the same conditions as Kuntelos, a factor the district court found most significant. *Id.*

Kuntelos, tested and scored under the altered testing procedure, received a marginally higher score than Karahalios' original score.[2] No attempt was made to retest Karahalios under the modified testing procedure. JA at 85.

[2] In addition to the other testing irregularities, evidence was presented (continued)

As a result of the test scores, both men were referred to the selecting official, who chose Kuntelos. JA at 85. Despite the fact that he had been performing satisfactorily in the course developer job for the last year, the employer-agency demoted Karahalios to the rank of instructor, a drop in grade from GS-11 to GS-9. JA at 85. The demotion resulted in loss of pay, commensurate loss of retirement benefits, and loss of prestige. JA at 82-90.

Karahalios took *every* step he could to object to the process by which he was deprived of his job. First, he completely exhausted his contractual remedies and second, his administrative remedies, all to no avail.

First, he filed two grievances with the employer-agency, charging that the process which led to his demotion was invalid due to the improper testing procedures. JA at 85. He received assistance from a union representative, who felt that Karahalios' grievances were meritorious. However, the employer-agency denied both grievances. *Id.*

Karahalios then requested that the union pursue these grievances to arbitration. The union, without any consideration of the merits of the grievance, decided not to arbi-

which tended to show that Kuntelos' test was improperly scored. Different scoring guidelines were used instead of the scoring guidelines called for by the arbitrator who "reconstituted" Karahalios' job. Karahalios produced evidence that, had the original guidelines been used, he would have scored higher than Kuntelos. Karahalios, not Kuntelos, would then have been referred to the selecting official as a "repromotion eligible." The district court indicated that it could not be certain which scoring guidelines the arbitrator would have used, had he been aware of the different guidelines. JA at 95-96, n.11.

Because of the fundamental irregularities in the testing process, the district court believed that the tests of the two employees simply could not be meaningfully compared. *Id.*

trate for Karahalios. JA at 86. The union apparently relied solely on a letter from counsel advising that arbitrating for Karahalios would constitute a "conflict of interest" with the earlier arbitration for Kuntelos. *Id.* The union refused to appoint independent counsel for Karahalios to take the case to arbitration, even though both the *union counsel* and Karahalios suggested that the union do so. JA at 86, n.7. Karahalios unsuccessfully attempted to invoke arbitration on his own, but the employer-agency refused to arbitrate on the basis that only the union could request arbitration, not an individual employee. JA at 87.

Second, Karahalios attempted to obtain redress through administrative channels. He filed unfair labor practice charges with the Federal Labor Relations Authority ("FLRA") against both the union and the employer-agency. JA at 87. The FLRA Regional Director dismissed both charges. Karahalios then appealed to the FLRA General Counsel. The General Counsel overturned the Regional Director, and specifically stated that the union had violated its duty of fair representation in denying Karahalios' request to arbitrate. The case was remanded with directions to the Regional Director to issue a complaint against the union, absent a settlement. JA at 41-42, and 87.

However, on remand, the Regional Director provided absolutely no relief to Karahalios. The Regional Director, in pursuing the FLRA's institutional goals and *without consulting Karahalios*, entered into one of the FLRA's pre-printed standard-form settlement agreements with the union. JA at 43. The only obligation imposed upon the union was the posting of a form notice (JA at 46-47) as follows:

WE HEREBY NOTIFY OUR MEMBERS THAT:

WE WILL NOT inform employees that where two or more employees are seeking one position, the union, the National Federation of Federal Employees, Local 1263, cannot represent all such employees in the contractual grievance procedure.

WE WILL NOT inform employees that it would be a conflict of interest for the union, the National Federation of Federal Employees, Local 1263, to represent all such employees.

WE WILL NOT in any like or related manner interfere with, restrain or coerce any employees in the exercise of their rights under the Statute.

Karahalios unsuccessfully objected to the settlement as it provided him with no relief whatsoever. JA at 88. Karahalios then sought review of the settlement by the FLRA General Counsel because the settlement was completely ineffectual as to him. The General Counsel, in his "unreviewable discretion," declined to overturn the settlement. *Id.*

Finally, Karahalios filed this lawsuit in federal district court against both the union for breach of the duty of fair representation and the employer-agency for breach of the collective bargaining agreement.[3] JA at 4. Prior to trial, the district court held that it had jurisdiction over

[3] The district court held that it had no jurisdiction for the action against the employer-agency. To the extent that the amount sought against the employer-agency was over $10,000, the district court held that, under the Tucker Act (28 U.S.C. §§ 1346 (a)(2), 1491), such actions had to be brought in the United States Claims Court. JA at 70-71.

The district court later granted summary judgment in favor of the employer-agency, from which an appeal was filed. JA at 2. The case against the employer-agency was settled after the appeal was filed.

the duty of fair representation claims pursuant to 28 U.S.C. § 1331, because there was an implied duty of fair representation arising out of the congressional grant of exclusive representation in the CSRA. *Karahalios I*, JA at 48.

After trial on the merits, the district court found that the union had violated its duty of fair representation to Karahalios in *three* separate instances: The first violation came when the union decided to arbitrate on behalf of Kuntelos (the union board member) for Karahalios' job—an action which ultimately led to Karahalios' demotion—without investigating Karahalios' views or qualifications, and without taking into account the consequences which the arbitration might have upon Karahalios' job. JA at 91. The second violation occurred when the union failed to provide any notice whatsoever to Karahalios that the Kuntelos arbitration was taking place, and similarly failed to present Karahalios' position to the Kuntelos arbitrator. JA at 91. The third violation came when the union refused to arbitrate for Karahalios without considering the merits of his grievance. JA at 92.

The district court awarded Karahalios damages in the form of attorneys' fees incurred in pursuing the FLRA unfair labor practice charges (JA at 98), and in the litigation against the union under the "common benefit" doctrine. *Harrison v. United Transportation Union*, 530 F.2d 558, 564 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). JA at 99. Back pay damages were denied as the district court could not find that Karahalios had a "clear edge" over the other employee.[4] JA at 95.

[4] Karahalios contended on appeal that the tainted testing procedure and the union's breaches of the duty of fair representation made meaningful comparisons between the two employees impossible. However, the damage issues were not reached by the Ninth Circuit in light of its holding that there was no jurisdiction to hear the claim. Pet.App. at 7a.

The U.S. Court of Appeals for the Ninth Circuit reversed, reaching only the jurisdictional issue. The court held that notwithstanding this Court's rationale in *Vaca v. Sipes*, 386 U.S. 171 (1967), Congress intended in passing the CSRA to prevent a federal employee from suing his union for breach of the duty of fair representation in federal court. Pet.App. at 9a.

The Ninth Circuit opinion was filed July 13, 1987. The petition for writ of certiorari was timely filed on October 7, 1987. Certiorari was granted June 6, 1988.

SUMMARY OF ARGUMENT

For the last forty years, the federal courts have provided a judicial forum for employees injured by their unions' actions in violation of the duty of fair representation. *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944). In order to assure that the employee is not deprived of effective remedies when the exclusive representation system breaks down, this Court has long recognized that court jurisdiction over duty of fair representation cases is crucial. *Vaca v. Sipes*, 386 U.S. 171, 182-83 (1967). District court jurisdiction over duty of fair representation cases exists in every other national labor law structure—the private sector, *id.*; the railroad sector, *Steele*, 323 U.S. 192; and the postal sector, *Bowen v. United States Postal Service*, 459 U.S. 212 (1983). No reason exists to depart from these well-established rules and to carve out an exception where federal employees, as opposed to private sector employees, railway employees, or postal employees, are concerned.

In *Vaca*, the Court recognized that administrative agencies charged with administering labor relations sta-

tutes have pre-eminent institutional goals which may, at times, result in subordinating the individual employee's need for redress to bargaining unit-wide remedies (as happened in this case). If the damaged employee were deprived of a judicial forum, the basic principles underlying the duty of fair representation would be frustrated, and the constitutionality of the congressional grant of exclusive representation called into question. *Vaca*, 386 U.S. at 183. The concerns recognized by the Court in *Vaca* are equally present in the federal sector.

Private sector unions do not enjoy a monopoly on arbitrary and discriminatory conduct toward the employees they are charged with representing. As this case demonstrates, federal sector unions are as likely to abuse their exclusive representation powers—at the expense of individual employees in the bargaining unit—as are their union counterparts in the private sector.

As in the private sector, the federal employee injured by the arbitrary and discriminatory actions of his exclusive bargaining representative may well be deprived of any effective administrative remedy. The FLRA General Counsel, like the NLRB General Counsel in the private sector, may refuse to issue a complaint, even in a clearly meritorious case, or may opt in favor of a unit-wide solution at the expense of an individual solution for the employee (as it did in this case), leaving the employee remediless. The FLRA General Counsel's unreviewable discretion and the FLRA's overriding institutional concerns mandate a judicial forum for duty of fair representation cases to ensure redress for the harm done to the individual employee. *Vaca*, 386 U.S. at 182-83.

Congress manifested no intent to depart from the considerations underlying the rulings in *Steele* and *Vaca* when

it passed the CSRA. The legislative history demonstrates that Congress intended the remedial provisions of the federal sector collective bargaining system to track the NLRA model. There is absolutely no legislative history which indicates that Congress intended to create an exception to traditional district court jurisdiction over duty of fair representation cases. The sum total of the CSRA legislative history regarding the duty of fair representation is one congressman's three-line remark simply acknowledging that the unions representing federal employees had a duty of fair representation. Congressional intent to change the holding in *Vaca* where federal employees are concerned was never discussed in any guise whatsoever.

If Congress had actually intended to repeal the established rules of *Steele* and *Vaca* in the federal sector, it is reasonable to suppose that Congress would have said *something* about this, especially as these holdings represent some of the most fundamental concepts in the national labor relations structure. Congress' silence on this issue must be taken as acceptance of the long-established principles of *Steele* and *Vaca*. Certainly there was no congressional intent manifested at any time to reach a different result for federal sector employees; nor was there any indication of congressional intent to provide federal employee unions with immunity from lawsuits brought by injured employees.

In short, no valid reason exists for this Court to create an exception to the long-held principle of federal court jurisdiction over duty of fair representation claims where federal employees are concerned. Just as the Court recognized in *Vaca*, denial of a judicial forum to Karahalios would indeed "frustrate the basic purposes underlying the duty of fair representation." 386 U.S. at 182, n.8.

ARGUMENT

I. THE UNIQUE NATURE OF THE DUTY OF FAIR REPRESENTATION AND ITS ENFORCEMENT OVER THE PAST FORTY YEARS MANDATE THAT FEDERAL COURTS REMAIN OPEN TO FEDERAL EMPLOYEES INJURED BY THE ARBITRARY OR DISCRIMINATORY CONDUCT OF UNIONS CLOTHED WITH EXCLUSIVE REPRESENTATION POWERS.

This Court has long recognized that the broad authority of the union as an exclusive bargaining agent must be "accompanied by a responsibility of equal scope, the responsibility and duty of fair representation." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976), *citing Humphrey v. Moore*, 375 U.S. 335, 342 (1964). The duty of fair representation stands as "a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *DelCostello v. Teamsters*, 462 U.S. 151, 164, n.14 (1983), *citing Vaca*, 386 U.S. at 182.

In order to assure that the employee is not deprived of effective remedies when the exclusive representation system breaks down, this Court has repeatedly recognized that federal district court jurisdiction over duty of fair representation cases is essential. *DelCostello*, 462 U.S. at 164, n.14; *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 47-48, n.12 (1979); *Glover v. St. Louis-San Francisco R. Co.*, 393 U.S. 324, 328-29 (1969); *Vaca*, 386 U.S. at 182-83. Federal court jurisdiction over duty of fair representation claims exists regardless of whether the injured employee is a railway employee under the Railway Labor Act ("RLA"), 45

U.S.C. §§ 151 *et seq.*, *e.g.*, *Steele*, 323 U.S. 192, *Czosek v. O'Mara*, 397 U.S. 25 (1970); a private sector employee under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.*, *Vaca*, 386 U.S. 171, *Hines*, 424 U.S. at 564; or a postal service employee, *Bowen*, 459 U.S. at 218.[4]

This Court must now decide whether to create an *exception* to the district courts' traditional jurisdiction over duty of fair representation cases where federal employees (instead of railway employees, postal employees, or private sector employees) are injured by their exclusive representative.

Federal courts should not be barred to the injured employee simply because he works for the federal government. The same concerns which compelled district court jurisdiction under the RLA and NLRA, *i.e.*, the policies of preventing arbitrary and discriminatory union misconduct and of ensuring adequate redress for each individual employee injured by his union's misconduct, apply with equal force in the federal arena. Private sector unions, postal sector unions, and railway sector unions do not enjoy a monopoly on arbitrary, invidious, and bad-faith conduct toward the employees whom they are charged with representing. Federal employee unions (many of which also operate in the private sector) should not be held to a lesser standard of accountability where federal sector employees (as opposed to private sector employees) are involved.

As this case aptly demonstrates, the federal courts must remain open or the damages suffered by the individual employee may be too easily subordinated to the institutional concerns of the FLRA (or NLRB), leaving the employee remediless.

> The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine.

Vaca, 386 U.S. at 183.

II. FEDERAL COURT JURISDICTION OVER DUTY OF FAIR REPRESENTATION CLAIMS HAS LONG BEEN RECOGNIZED AS AN ESSENTIAL UNDERPINNING OF THE COLLECTIVE BARGAINING FRAMEWORK.

One of the cornerstones in the private sector labor law structure is the union's duty of fair representation. The Court has recognized that, "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca*, 386 U.S. at 182. "In vesting the representatives of the majority with this broad power Congress did not, of course, authorize a tyranny of the majority over minority interests." *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 64 (1975); *see also*, *DelCostello*, 462 U.S. at 164, n.14; *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 171, 180 (1967). Consequently, the Court has fashioned the duty of fair representation to counterbalance Congress' grant of exclusive representation power to the unions. *Vaca*, 386 U.S. at 177; *Humphrey*, 375 U.S. at 342; *Steele*, 323 U.S. at 202-03.

Essential to the duty of fair representation is the injured employee's unconditional ability to seek redress in the courts. *Vaca*, 386 U.S. at 182. This Court in *Vaca*

underscored the significance of the special concerns of the individual employee in a duty of fair representation case, and held that these interests compelled *judicial*, as opposed to merely administrative, review:

> *[T]he unique interests served by the duty of fair representation doctrine have a profound effect, in our opinion, on the applicability of the pre-emption rule to this class of cases....* The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit. This Court recognized in *Steele* that the congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination. Since that landmark decision, *the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.*

386 U.S. at 182 (citations omitted) (emphasis added).

The Court further acknowledged that the NLRB, as an administrative agency, is not particularly well structured to remedy *individual* duty of fair representation injuries. Unlike a trial court, redress of individual grievances is not the primary purpose of administrative agencies such as the NLRB (or the FLRA). 386 U.S. at 182, n.8. *Vaca* recognized that the NLRB's (and, by extension, the FLRA's) administrative focus in considering an unfair labor practice case where the duty of fair representation is involved does not specifically concern the wrong done to the employee.

> The public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies. Thus, the General Counsel will refuse to bring complaints on behalf of injured employees where the injury complained of is "insubstantial."

Id. (citations omitted).

Considering the necessarily limited institutional role of the NLRB, together with the NLRB General Counsel's unreviewable discretion to issue unfair labor practice complaints, this Court in *Vaca* acknowledged that the available administrative remedies were often inadequate in duty of fair representation cases. The Court was concerned that the limited administrative focus of the NLRB might lead to a group of employees whose individual complaints were never adequately redressed. This concern led directly to the enunciation in *Vaca* of the right to have these issues determined by a court, not the NLRB. Only in a court, where the focus is on the wrongs done to the individual employee before it, would the harm done to the employee be adequately and completely remedied. As Justice White emphasized in *Vaca*:

> The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine.

386 U.S. at 183.

Even though the union's actions in question might also constitute an unfair labor practice which could be heard by the NLRB, the Court's solicitude for the po-

tential inadequacy of the administrative remedy for individual employees led to the holding that the courts must provide a forum for individual redress. *Id.*, at 188. As the Court has recognized, where duty of fair representation cases are involved, the right of the individual employee to be made whole is "[o]f paramount importance," *Bowen*, 459 U.S. at 222; *cf. Foust*, 442 U.S. at 49; *Steele*, 323 U.S. at 206-07. This is a concept which necessitates a judicial, not an administrative, forum.

This case provides an excellent example of the exact concerns recognized by *Vaca*. Karahalios' long and unproductive journey through the FLRA in this matter was chronicled in the district court complaint. JA at 4. The year and a half of processing charges against both the employer and the union resulted in a determination by the FLRA General Counsel that the union had committed an unfair labor practice when it breached its duty of fair representation to Karahalios. JA at 41-42.

However, instead of pursuing a remedy for the harm done to Karahalios by the union, the FLRA Regional Director entered into a settlement agreement with the union which provided for dismissal of the case so long as the union would post a notice advising its other employees that it would not behave towards them in the future as it had behaved towards Karahalios. JA at 43. This settlement was reached without the agreement, and over the express objections, of Karahalios, the injured party. JA at 88. This settlement provided no compensation whatsoever to Karahalios for the union's wrongdoing. It should be noted that nowhere in the FLRA correspondence is there any discussion of the financial impact of the union's wrongful conduct on Karahalios. JA at 42, 44; Exhibit 19 to First Amended

Complaint, Tab 14, Excerpts of Record on Appeal. Compensating Karahalios for the harm done to him was evidently not the primary concern of the FLRA here.

The actions of the FLRA may well have been calculated to promote labor peace in the federal employment sector. But what of the employee who was actually harmed in this case? No actions taken by the FLRA even pretend to be a remedy for him.

This is *precisely* the wrong about which this Court was so concerned in *Vaca*. The agency charged with keeping the peace in the federal employee context has done exactly that, but in the process it ignored the individual harm to this employee. Surely a comprehensive system of federal labor relations cannot ask the federal employee to surrender his individual rights to a union, but then strip him of the ability to obtain an effective remedy when the union abdicates its responsibilities. The courthouse is the only forum where the individual employee can be assured that the harm done to him by the union will be unconditionally and adequately redressed.

III. THE LOGIC AND STRUCTURE OF CONGRESS' FEDERAL LABOR RELATIONS SCHEME COMPEL THE ASSERTION OF FEDERAL COURT JURISDICTION OVER DUTY OF FAIR REPRESENTATION BREACHES IN THE FEDERAL SECTOR.

A. CONGRESS USED THE PRIVATE SECTOR COLLECTIVE BARGAINING SYSTEM AS A MODEL FOR FEDERAL SECTOR LABOR RELATIONS.

When Congress enacted the CSRA, it was intended to be a comprehensive revision of the laws regarding federal

government employees. *Bureau of Alcohol, Tobacco, and Firearms v. FLRA*, 464 U.S. 89, 91 (1983). Included in the revision was the first congressional codification of a federal sector collective bargaining system. 5 U.S.C. §§ 7101 *et seq.*; *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. at 91; *see generally* Brower, *The Duty of Fair Representation Under the Civil Service Reform Act: Judicial Power to Protect Employee Rights*, 40 OKLA. L. REV. 361 (1987).

Congress closely modeled the new federal sector collective bargaining system on the private sector scheme under the NLRA. *National Treasury Employees Union v. FLRA*, 810 F.2d 295, 299-300 (D.C. Cir. 1987); *Columbia Power Trades Council v. United States Dept. of Energy*, 671 F.2d 325, 326 (9th Cir. 1982); *See* H.R. REP. NO. 1403, 95th Cong., 2d Sess. 1, 41 (1978); Message of Pres. Carter on Civil Service Reform, March 2, 1978, *reprinted in* H.R. REP. NO. 1403 at 102; *see also Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. at 92-93, 107. There is little doubt that in enacting the CSRA Congress intended to adopt the same basic framework for resolving collective bargaining disputes as existed in the private sector. Both the structure of the CSRA and the legislative history bear this out. The parallels between the CSRA and the NLRA are striking. As in the NLRA, Title VII of the CSRA provides for the election of bargaining representatives by majority vote (*compare* 29 U.S.C. § 159 *with* 5 U.S.C. § 7111(b)-(d)), and exclusive union representation (*compare* 29 U.S.C. § 159(a) *with* 5 U.S.C. § 7111(a)).

The collective bargaining structure in the CSRA is based upon familiar NLRA concepts. To administer this new collective bargaining system, Congress created a new administrative agency—the FLRA—which was intended

to be directly analogous to the private sector NLRB. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. at 92-93, 97. There is clear congressional intent to make the role and powers of the FLRA mirror those of the NLRB.

> The Committee intends that the Authority's role in Federal sector labor-management relations be analogous to that of the National Labor Relations Board in the private sector.

H.R. REP. NO. 1403, at 41.

As another part of the administrative structure, Congress created the office of the FLRA General Counsel, which was designed to play a role identical to the NLRB's General Counsel.

> It is intended that unfair labor practice complaints will be handled by the General Counsel of the Authority in a manner essentially identical to the National Labor Relations Board in the private sector.

S. REP. NO. 969, 95th Cong., 2d Sess. 3, 106 (1978).

The FLRA General Counsel has "unreviewable discretion" to issue or refuse to issue an unfair labor practice complaint, just as the NLRB General Counsel has. *Compare* 5 U.S.C. § 7118(a)(1) *with* 29 U.S.C. §§ 153(d), 160(b); *see also* H.R. REP. NO. 1403 at 52; S. REP. NO. 969, at 102; *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-39 (1975); *Turgeon v. FLRA*, 677 F.2d 937, 940 (D.C. Cir. 1982).

The CSRA also provides for judicial review of certain actions of the FLRA, which closely parallels companion provisions in the NLRA. First, both statutes permit circuit court review of final orders of the administrative agencies (the FLRA and the NLRB). *Compare* 5 U.S.C. § 7123(a) *with* 29 U.S.C. § 160(f). Second, the FLRA (or the NLRB) may petition the court of appeals for enforcement of any FLRA (or NLRB) order. *Compare* 5 U.S.C. § 7123(b) *with* 29 U.S.C. § 160(e). Third, the FLRA (like the NLRB) may petition the district court for temporary injunctive relief after an unfair labor practice complaint has been issued. *Compare* 5 U.S.C. § 7123(d) *with* 29 U.S.C. § 160(j).

This Court has recognized that the CSRA was based upon many of the same basic policies underlying the collective bargaining process in the private sector model. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. at 107-08. The similarities between the two acts have led this Court, as well as lower courts, to use the well-developed private sector case law for guidance in interpreting many areas of the CSRA. *E.g., EEOC v. FLRA*, 476 U.S. 19, 23 (1986) (*per curiam*) (NLRA used as model for determining procedure for judicial review of FLRA actions); *National Treasury Employees Union v. FLRA*, 810 F.2d at 299 (mid-term duty to bargain rules under NLRA used to determine whether mid-term bargaining is necessary under CSRA); *Library of Congress v. FLRA*, 699 F.2d 1280, 1286-87 (D.C. Cir. 1983) (NLRA precedent used to determine scope of duty to bargain regarding matters beyond the exclusive control of the employer-agency).

However, lower courts have declined use of the NLRA model as controlling precedent where policies unique to the federal sector have been involved. *Library of Congress v. FLRA*, 699 F.2d at 1287; *National Treasury Employees Union v. FLRA*, 826 F.2d 114, 122 (D.C. Cir 1987).

Thus, in *National Treasury Employees Union v. FLRA*, 826 F.2d at 121-22, the District of Columbia Circuit held that unique federal sector considerations in efficient government management allowed the employer-agency to solicit suggestions directly from the employees for improvement of the workplace, a result which would have been barred *per se* in the private sector. This result recognizes that the government, as the employer, has some distinct differences from the private employer.[5]

In this case, however, there are no unique "governmental employer" concerns which require different treatment of duty of fair representation violations when they occur in the federal sector. The same policy considerations underlying district court jurisdiction over duty of fair representation claims in the private sector are present with equal force in the federal sector. *See* Brower, 40 OKLA. L. REV. at 387. The FLRA, in following its institutional mandate in identical fashion to the NLRB, may well overlook the injuries sustained by an individual employee in favor of creating a bargaining unit-wide remedy (as in this case). The individual employee passed over by this process has no effective remedy to recover the damages caused by his union's breach.

B. THERE IS NO INTIMATION IN THE CONGRESSIONAL HISTORY THAT CONGRESS, IN PASSING THE CSRA, INTENDED IN ANY WAY TO DEPART FROM WELL-RECOGNIZED DISTRICT COURT JURISDICTION OVER DUTY OF FAIR REPRESENTATION CLAIMS.

[5] For example, both compulsory arbitration of grievances and the use of the strike weapon are treated differently in the federal sector due to congressional concerns about the special nature of public employee labor relations. *Compare* 5 U.S.C. § 7117 *with* 29 U.S.C. § 158(a)(5) *and* (b)(3) (duty to bargain); *compare* 5 U.S.C. § 7116(b)(7) *with* 29 U.S.C. §§ 157 *and* 158 (legitimacy of the strike weapon).

1. THERE WAS *NO* CONGRESSIONAL DISCUSSION OF FEDERAL COURT JURISDICTION OVER DUTY OF FAIR REPRESENTATION CASES WHEN THE CSRA WAS PASSED. IF CONGRESS HAD WANTED TO ALTER FORTY YEARS OF THIS COURT'S PRECEDENTS AND ELIMINATE THE JUDICIALLY ENFORCEABLE DUTY OF FAIR REPRESENTATION IN THE CSRA, ONE MIGHT REASONABLY EXPECT CONGRESS TO HAVE SAID *SOMETHING* ABOUT THAT ISSUE.

Although the legislative history of the CSRA is voluminous, it contains virtually nothing pertaining to the duty of fair representation or to federal court jurisdiction over fair representation claims. *See* Brower, 40 OKLA. L. REV. at 365-77. While there are ample indications in the legislative history that Congress intended to substantially strengthen the role of the unions when it passed the CSRA (*Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. at 107; Brower, 40 OKLA. L. REV. at 361-62), there is no indication that Congress paid any attention whatsoever to the duty of fair representation issues specifically presented in this case. In the 179 pages of debate on the CSRA in the *Congressional Record*, there is no mention of the duty of fair representation. Brower, 40 OKLA. L. REV. at 368-69.

The *only* mention of the duty of fair representation in any part of the legislative history came when Representative Ford, after the debates, made a brief remark as he was introducing the joint House-Senate committee bill. His only statement in this regard was: "The labor organization is required to meet a duty of fair representation for all employees, even if not dues paying members, who

use the negotiated grievance procedure." 124 CONG. REC. H13,609 (daily ed. Oct. 4, 1978) (remarks of Rep. Ford). Representative Ford's single remark is hardly sufficient to infer congressional intent to depart from the considerations enunciated in *Steele* and *Vaca*, and to preclude traditional district court jurisdiction over duty of fair representation cases.

Nothing in the CSRA's legislative history indicates that Congress intended to force individual federal employees to work in a system which offers them no certain protections from abuse by their exclusive representative. Given the significance of this Court's decision decades ago in *Vaca*, if Congress did intend to depart from *Vaca* and extinguish federal court jurisdiction over duty of fair representation cases in the federal sector, it is certainly reasonable to assume that some meaningful discussion on this subject would have occurred at some point in the legislative history. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is held to be aware of the Court's decisions when it enacts legislation); *United States v. Fausto*, 484 U.S. _____, 108 S. Ct. 668, 677 (1988) (Blackmun, J., concurring) ("well established aversion to recognizing 'implied' repeals of remedial provisions or of judicial review"). If Congress intended to provide immunity from suit in federal district court for federal sector unions guilty of malfeasance, surely some mention of this subject would have taken place during the congressional debates, either from the union proponents or union adversaries.

Instead, there is *absolutely no discussion* of this issue, and, accordingly, no indication of any sort that Congress wished to depart from the principles established forty years ago in *Steele* and firmly underscored again twenty

years ago in *Vaca*. In fact, what little legislative history exists indicates that Congress intended the federal judiciary to play the same role *vis-a-vis* the FLRA as they do for the NLRB.[6]

2. THE FEDERAL COURTS' TRADITIONAL JURISDICTION OVER DUTY OF FAIR REPRESENTATION CLAIMS IS NOT PRECLUDED IN THE FEDERAL SECTOR BY THE LACK OF AN ANALOGUE TO § 301 OF THE NLRA.

The Ninth Circuit below and some other lower courts which have refused to accept jurisdiction over federal employees' duty of fair representation claims have premised that refusal upon the lack of a supposed analogue in the CSRA to § 301 of the NLRA, 29 U.S.C. § 185.[7]

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[6] Under the CSRA (just as under the NLRA), appellate court review of a final order of the FLRA is available. *Compare* 5 U.S.C. § 7123(a) *with* 29 U.S.C. § 160(f). This judicial involvement in federal sector labor relations was a marked departure from the supplanted Executive Order system. Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 Comp.); *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. at 92 (no judicial review of Federal Labor Relations Council orders).

Further, a floor amendment by Rep. Collins of Texas which would have transplanted the virtually nonexistent role of the courts from the Executive Order into the CSRA (124 CONG. REC. H9618-24 (daily ed. Sept. 13, 1978)) was soundly defeated in favor of a substitute amendment by Representative Udall which provided increased judicial power. 124 CONG. REC. H9625-32 (daily ed. Sept. 13, 1978). The Udall substitute essentially became 5 U.S.C. § 7123(a) and (b). *See* Brower, 40 OKLA. L. REV at 374.

Of course, the corresponding availability under the NLRA of circuit court review of NLRB actions has not precluded district court jurisdiction for duty of fair representation claims. *E.g., Vaca*, 386 U.S. 171; *DelCostello*, 462 U.S. 151; *Bowen*, 459 U.S. 212.

[7] Originally, the House version of the CSRA contained a provision, § 7121(c), which permitted parties to the collective bargaining agreement

(continued)

Pet.App. at 13a; *Warren*, 764 F.2d at 1397-99; *contra*, *Pham v. AFGE, Local 916*, 799 F.2d 634, 638-39 (10th Cir. 1986).

The lower courts which refused to accept jurisdiction over federal employees' duty of fair representation claims because of the lack of a § 301 analogue in the CSRA did so based upon two demonstrably faulty premises: (1) that § 301 is the basis of federal court jurisdiction over duty of fair representation claims in the private sector; and (2) that Congress considered and deleted a section of the CSRA, § 7121(c), that was supposedly analogous to § 301 of the NLRA.

a. Section 301 of the NLRA is not the basis of federal court jurisdiction over private sector duty of fair representation claims; such jurisdiction arises under the congressional grant to the unions of exclusive representation power.

Those courts which have refused to assert jurisdiction over federal employees' duty of fair representation claims because of the lack of a § 301 analogue in the CSRA have failed to recognize that § 301 does not provide the jurisdictional basis for private sector duty of fair representation claims. *See DelCostello*, 462 U.S. at 164.

This Court has recognized: (1) that jurisdiction over duty of fair representation claims is implied from the grant of exclusive representation status, *id*; (2) that jurisdiction

to petition the district courts to compel arbitration if the contract so provided. The Eleventh Circuit, for instance, analogized proposed § 7121(c) of the CSRA to § 301 of the NLRA, and held that Congress' failure to actually enact § 7121(c) in the CSRA showed an intention to limit the federal courts' jurisdiction over duty of fair representation claims. *Warren v. Local 1759, AFGE*, 764 F.2d 1395, 1397-99 (11th Cir.), *cert. denied*, 474 U.S. 1006 (1985).

exists over such claims arising under the RLA (which has no § 301 analogue), *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324 (1969); and (3) that jurisdiction exists over such claims, regardless of whether they are coupled with a § 301 "hybrid" claim against an employer. *Communications Workers of America v. Beck*, ____ U.S. ____, 108 S. Ct. 2641 (1988). Under these familiar principles, district court jurisdiction over duty of fair representation claims in the federal sector is clearly appropriate, because these claims "arise under" the congressional grant of exclusive representation. *See* 28 U.S.C. § 1331.

The duty of fair representation did not find its genesis in any explicit statute. In the private sector the duty has been judicially fashioned by this Court from the national labor statutes, in both the RLA and NLRA contexts. *E.g.*, *Steele*, 323 U.S. 192 (RLA); *DelCostello*, 462 U.S. at 164 (NLRA).

In a companion case to *Steele*, *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 213 (1944), the Court specifically held that federal court jurisdiction over employees' duty of fair representation claims was predicated upon 28 U.S.C. § 41(8), the statutory predecessor of 28 U.S.C. § 1337.[8] Significantly, both *Steele* and *Tunstall* arose under the RLA, which contains *no* § 301, or even a rough analogue thereto. In fact, *Steele* and *Tunstall* predated the enactment of § 301 of the NLRA by several years.

[8] 28 U.S.C. § 1337 is the commerce counterpart of 28 U.S.C. § 1331, the "general federal question jurisdiction" statute. It is generally recognized that § 1337 is merely the more specific of these two jurisdictional grants, and that any case which can be brought under § 1337 can also be brought under § 1331. *See* 13B Wright & Miller, *Federal Practice & Procedure*, § 3574 (1984); *Gorski v. Local Union 134*, 636 F. Supp. 1174, 1183, n.14 (N.D. Ill. 1986).

Since *Steele* and *Tunstall*, many other duty of fair representation cases have arisen under the RLA, and federal courts have had unquestioned jurisdiction notwithstanding the lack of a § 301 analogue in that statute. *See, e.g., Glover*, 393 U.S. 324; *Conley v. Gibson*, 355 U.S. 41 (1957); *Bagnall v. Airline Pilots Association*, 626 F.2d 336 (4th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981).

Moreover, under the NLRA, this Court has recently recognized that many private sector duty of fair representation suits comprise two distinct causes of action: one against the employer for breach of contract under § 301, and the other against the union for breach of the duty of fair representation, with jurisdiction impliedly arising under the congressional grant of exclusive representation contained in § 9(a) of the NLRA. *DelCostello*, 462 U.S. at 164, n.14. *See also Bowen*, 459 U.S. 212. (These combined claims have been referred to as "hybrid § 301/fair representation" claims.) *DelCostello* teaches that the true jurisdictional bases for the union's portion of the "hybrid" duty of fair representation claim are 28 U.S.C. §§ 1331 and 1337, because those claims "arise under" the congressional grant of exclusive representation, § 9(a) of the NLRA. *See* Boyce & Turner, *Fair Representation, the NLRB, and the Courts* 123-27 (No. 18, Labor Relations and Public Policy Series, University of Pennsylvania Wharton School, Industrial Research Unit, 1984).

In addition to "hybrid" § 301/fair representation claims, employees in the private sector have successfully brought duty of fair representation actions against their unions for a wide array of arbitrary, discriminatory and hostile conduct which was *not* specifically related to any

employer breach of contract. *E.g., Beck*, 108 S. Ct. 2641 (union uses nonmembers' agency fees for political activities); *Anderson v. United Paperworkers*, 641 F.2d 574 (8th Cir. 1981) (union misrepresentation regarding contract ratification issue); *Bowman v. Tennessee Valley Authority*, 744 F.2d 1207 (6th Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) (union negotiates contract discriminating against nonunion members of the bargaining unit); *Richardson v. CWA*, 443 F.2d 974, 983 (8th Cir. 1971) (union-inspired harassment and physical violence directed against nonunion employee). Many lower courts have held that the proper jurisdictional bases for these types of "bare" duty of fair representation claims are 28 U.S.C. §§ 1331 and 1337. *See Retana v. Apartment, Motel, Hotel & Elevator Operators Local 14*, 453 F.2d 1018 (9th Cir. 1972); *Smith v. Local 25, Sheet Metal Workers*, 500 F.2d 741 (5th Cir. 1974); *Anderson*, 641 F.2d at 576; *Gorski*, 636 F. Supp. at 1182-83; *see also* Boyce & Turner, *Fair Representation, the NLRB, and the Courts* 123-27.

Thus, federal court jurisdiction over fair representation claims does not depend on the existence of a § 301 "analogue." Moreover, as the Tenth Circuit recognized, the lack of a § 301 analogue in the CSRA may conceivably reflect congressional concerns regarding waiver of sovereign immunity for the federal employer. *Pham*, 799 F.2d at 638-39. Congress may indeed have intended to protect the sovereign from damage claims by injured employees. However, sovereign immunity considerations are unique to the federal employer and have nothing to do with the relationship between the federal employee and his union. As the Tenth Circuit acknowledged, "it does not follow that Congress intended to proscribe private actions by

federal employees against their unions simply because it did not create a § 301 twin in the [CSRA]." *Id.*

b. In passing the CSRA, Congress did not delete a provision analogous to § 301 of the NLRA.

The Ninth Circuit, and other lower courts, have erroneously concluded that congressional intent to preclude district court jurisdiction over duty of fair representation claims can be divined from Congress' failure to pass a provision (H.R. 11,280, proposed § 7121(c)) which would have authorized suits for injunctions to compel arbitration in district court. Pet.App. at 9a-10a; *Warren*, 764 F.2d at 1398-99; *Yates v. Soldiers & Airmen's Home*, 533 F. Supp. 461 (D.D.C. 1982); *contra*, *Karahalios II*, 544 F. Supp. at 80 (JA at 69), *rev'd*, 861 F.2d at 1391-92 (Pet.App. at 1a).

Proposed § 7121(c) was omitted in the joint committee mark-up of Title VII, with no explanation other than "[t]he House recedes." H.R. CONF. REP. NO. 1717 at 157. Simply stated, the omission of that section cannot bear the construction forced upon it by the Ninth Circuit.

Section 7121(c), by any reading, is not the equivalent of § 301 of the NLRA. Section 301 is a broadly worded statute, differing from § 7121(c) in both language and scope. Section 301 specifically gives the district courts jurisdiction over any suits for violation of contracts between employers and unions:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

On the other hand, proposed § 7121(c) is a sharply limited statute which would have provided district court jurisdiction *only* over injunctive requests between employer and union to compel arbitration:

> Any party to a collective bargaining agreement aggrieved by the failure, neglect, or refusal of the other party to proceed to arbitration pursuant to the negotiated grievance provided in the agreement may file a petition in the appropriate United States District Court requesting an order directing that arbitration proceed pursuant to the procedures provided therefore in the agreement. The court shall hear the matter without jury, expedite the hearing to the maximum extent practicable, and issue any order it determines appropriate.

H.R. 11,280, § 7121(c).

The House Report regarding § 7121(c) shows the purpose of the provision to be focused on a single consideration: the power of the union or the employer-agency to seek an injunctive order to compel arbitration under a collective bargaining agreement. H.R. REP. NO. 1403 at 56. There is no mention in that report or in contemporaneous portions of the *Congressional Record* of any other purpose for the provision.

The removal of § 7121(c) by the Joint House-Senate Committee gives no indication of why the provision was not retained. Nor is there any explanation for the deletion in the *Congressional Record*. *See* 124 CONG. REC.

H11,820-27 (daily ed. Oct. 6, 1978). Since neither the presence nor the absence of the provision occasioned much thought on the part of Congress, the inferences which may be drawn from the cryptic comment, "[t]he House recedes," are minimal.

Additionally, lawsuits by unions or employers to compel conformity with the arbitration provisions of collective bargaining agreements, *e.g.*, proposed § 7121(c) actions, raise substantially different concerns than do fair representation lawsuits. Enforcement of collective bargaining agreements by compelling arbitration frequently entails examination of the provisions of the agreements themselves. *E.g.*, *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702 (1982); *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976); *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960). Deferral of these questions to the administrative agency presumably familiar with the particular contours of the scope of bargaining and arbitration in the federal sector is appropriate (*see* 5 U.S.C. §§ 7101, 7116(b)(7), 7117; *National Federation of Federal Employees v. Commandant, Defense Language Institute*, 493 F. Supp. 675, 679 (N.D. Cal. 1980))—especially since the two principal actors, unions and employers, are powerful enough to have their voices heard in the administrative forum. However, the fair representation obligation stems from a diametrically opposite premise: that the collective bargaining system and administrative procedures do not adequately protect the interests of the individual when they diverge from the principal actors. *Vaca*, 386 U.S. at 182-83; *Steele*, 323 U.S. at 202-03.

Further, in the private sector, binding arbitration is viewed as the *quid pro quo* for the no-strike clause (*Teamsters Local 174 v. Lucas Flour*, 369 U.S. 95 (1962)) and injunctions to compel arbitration may be tied to no-strike provisions. *See*, *e.g.*, *Buffalo Forge Co.*, 428 U.S. 397; *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). Since both the right to strike and compulsory arbitration raise different concerns in the federal sector, the eventual removal of § 7121(c) may well reflect a policy choice by Congress to defer these special federal sector questions to the administrative body created to handle them. In contrast, duty of fair representation claims raise none of these unique federal sector concerns.

The scant legislative history on the deletion of § 7121(c), and the vast differences between it and § 301 of the NLRA, provide no support for the contention that Congress intended to deprive federal courts of jurisdiction over duty of fair representation claims in the federal sector.

IV. IMPORTANT POLICY CONSIDERATIONS COMPEL A FINDING THAT FEDERAL EMPLOYEES HAVE THE RIGHT TO PURSUE DUTY OF FAIR REPRESENTATION CLAIMS IN FEDERAL COURT.

The same considerations which compel district court jurisdiction over duty of fair representation cases in the private sector, the railway sector, and the postal sector similarly compel jurisdiction over the same cases in the federal sector.

A. THE CONGRESSIONAL GRANT OF THE EXTRAORDINARY POWER OF EXCLUSIVE REPRESENTATION IS EQUIVALENT UNDER THE NLRA,

RLA AND CSRA. THERE ARE NO POLICY CONSIDERATIONS IN THE FEDERAL SECTOR WHICH WOULD JUSTIFY ELIMINATING A JUDICIAL REMEDY FOR EMPLOYEES INJURED BY INVIDIOUS UNION CONDUCT SOLELY BECAUSE A FEDERAL SECTOR EMPLOYER IS INVOLVED.

Because the CSRA was modeled upon the NLRA, courts and litigants have generally imported NLRA case law in deciding CSRA issues. *E.g.*, *National Treasury Employees Union v. FLRA*, 800 F.2d 1165, 1169-71 (D.C. Cir. 1986). This rule has not been applied blindly, as there are provisions unique to the CSRA which express special federal sector concerns not present in the NLRA or RLA contexts. For instance, the CSRA contains certain provisions alien to the collective bargaining framework established under the RLA and the NLRA. *See*, *e.g.*, 5 U.S.C. § 7106 ("Management Rights," limiting the scope of bargaining); and 5 U.S.C. § 7113 ("National Consultation Rights," requiring consultations with minority unions).

These special federal employer concerns have received judicial recognition in limited departures from the NLRA model, where such employer concerns exist, and where reference to the NLRA model appears unwarranted. *National Treasury Employees Union v. FLRA*, 826 F.2d at 122. Disputes over negotiability issues have, in some instances, been treated differently in the federal sector than in the private sector. *E.g.*, *Library of Congress v. FLRA*, 699 F.2d at 1287.

However, in contrast to negotiability disputes where unique federal sector concerns may exist, the duty of fair

representation is one issue where there is a *direct* parallel between the CSRA and private sector labor law, where no unique federal sector concerns are present, and where private sector labor law *should* be imported directly into the CSRA. *See* Brower, 40 OKLA. L. REV. at 392. Under all three of the federal labor statutes (the CSRA, NLRA and RLA), the individual employee's relationship with his exclusive representative is virtually identical. Under all three of the federal labor statutes Congress has granted unions the same extraordinary powers to exclusively represent even the most unwilling employee. *Compare* 29 U.S.C. § 159(a) *and* 45 U.S.C. § 152 Fourth *with* 5 U.S.C. § 7111.

Given this Court's long-held view that this union-employee "exclusivity" arrangement mandates a judicially enforceable duty of fair representation under the NLRA and RLA, *DelCostello*, 462 U.S. at 165, n.14, *citing Vaca*, 386 U.S. at 177, and *Steele*, 323 U.S. at 192, the same must hold true where the CSRA grants equivalent exclusive representation powers to federal employee unions. Indeed, as this Court recognized in *Vaca*, the very constitutionality of the congressional grant of exclusive representation is called into question without the existence of unconditional judicial remedies for injured employees. *Vaca*, 386 U.S. at 183, *citing Steele*, 323 U.S. at 198-99.

As this case demonstrates, the congressionally-sanctioned exclusive representation power under the CSRA, 5 U.S.C. § 7111, carries with it the same pitfalls and possibilities for abuse that exist under the NLRA and RLA. *See Karahalios III*, JA at 80. Karahalios was not a member of respondent NFFE. Yet he was forced to accept that union's exclusive representation, whether he

approved or not. Through its grant of exclusive representation, Congress subjected Karahalios to a regime which ill served him at best, and was hostile to him at worst. This was a forced relationship over which Karahalios had no control. This situation is identical to that faced by private sector employees, who depend upon the federal courts to protect their rights.

Accordingly, there is no reason to treat a federal sector employee injured by his exclusive representative any differently than a similarly injured private sector or railway sector employee. His relationship with his exclusive representative is identical. The union in each case has been clothed with equivalent powers that can make or break the employee and his career. Protection from abuse of that power cannot be made to depend upon the fortuity of the identity of the employer when it is the relationship between the union and the individual employee which is at the heart of the duty of fair representation and which is identical under each federal labor statute. Nor should the federal employee's quest for redress end with the unreviewable discretion of the FLRA General Counsel, while a similarly situated private employee has open access to the federal courts.

Additionally, there is another fundamental reason to treat employees under the CSRA similarly to those under the NLRA and RLA: many of the unions which represent employees under the NLRA and RLA also represent federal sector employees under the CSRA.[9]

[9] For instance, the International Association of Machinists and Aerospace Workers, AFL-CIO, a union long involved with employees under both the RLA and the NLRA, also represents federal employees under the CSRA. *See, e.g., Local Lodge 830, International Association of*
(continued)

It would be anomalous indeed for Congress to immunize arbitrary or discriminatory union conduct occurring under the CSRA, when the identical conduct by the same union would result in substantial liability under the NLRA or RLA. It makes little sense to have the enforcement of an employee's duty of fair representation rights depend upon the vagaries of who his employer is, particularly when his exclusive representative may well be operating concurrently under all three labor statutes, and presumably owes the same duty of fair representation under each statute.

In short, the federal employee is subjected to the same potential for abuse by his exclusive representative as employees in the private sector. Nothing in the CSRA changes the demonstrable needs of federal employees who may be saddled with a hostile, arbitrary or discriminatory exclusive representative.

B. THE UNREVIEWABLE DISCRETION OF THE GENERAL COUNSEL OF THE FLRA TO ISSUE, DECLINE TO ISSUE, OR SETTLE UNFAIR LABOR PRACTICE COMPLAINTS MANDATES AN AVENUE OF JUDICIAL REVIEW FOR AGGRIEVED FEDERAL EMPLOYEES.

Machinists and Aerospace Workers v. U.S. Naval Ordnance Station, Louisville, Kentucky, 20 F.L.R.A. 848 (1985), *enforced*, 818 F.2d 545 (6th Cir. 1987). Other largely private sector unions are also active in the federal employee sector. *See U.S. Army Field Artillery Center, Fort Sill, Oklahoma, and International Brotherhood of Teamsters Local 886*, 17 F.L.R.A. 1078 (1985); *Department of Transportation and United Transportation Union*, 16 F.L.R.A. No. 83 (1984); *Veterans Administration and Service Employees International Union, Local 73*, 16 F.L.R.A. No. 1 (1984); *International Brotherhood of Electrical Workers, Local GCC 1 and Department of Energy*, 17 F.L.R.A. No. 9 (1985).

The General Counsel of the FLRA, like his counterpart at the NLRB, has unreviewable discretion to issue, or decline to issue, unfair labor practice complaints. *Turgeon*, 677 F.2d at 940; *cf. Reed v. Collyer*, ____ U.S. ____, 108 S. Ct. 2885 (1988) (Scalia, J., dissenting). This unreviewable discretion presumably also includes the power to settle unfair labor practice complaints once issued, *even over the objection of the party most affected. NLRB v. United Food and Commercial Workers*, ____ U.S. ____, 108 S. Ct. 413, 422 (1987). It is the unique nature of this unreviewable discretion which so troubled this Court in *Vaca* and which is so very troubling in the instant case. As this Court recognized in *Vaca*, the administrative agency's interest is in "effectuating the policies of the federal labor laws, not the wrong done to the individual employee ...." 386 U.S. at 182, n.8.

As shown by the instant case, the FLRA General Counsel's unreviewable discretion strips the employee of an unconditional ability to protect his rights, and instead makes the enforcement of those rights dependent upon a "prosecutorial" official whose mandate does not necessarily include the redress of each individual employee's injury. The administrative process thus permits injured employees with valid claims to "fall through the cracks," and receive no redress. It is these employees, like Karahalios, who must have access to federal court.

Karahalios clearly "fell through the cracks" of the administrative system. Despite an ultimate finding by the district court that the respondent union had breached its duty to Karahalios in *three separate ways*, JA at 91-92, the General Counsel refused to seek redress for him, preferring instead to settle for a "notice-posting" remedy.

The remedy chosen by the FLRA benefited the bargaining unit in general, but was completely ineffectual as to Karahalios. The effect upon Karahalios of the loss of his job—a job in which he was performing competently and satisfactorily—together with his concomitant loss of pay, prestige and retirement benefits, was not addressed in any fashion by the FLRA. Thus, the courts must remain open to provide a remedy for an injured federal employee.

C. THE COURTS HAVE LONG DEVELOPED THE SUBSTANTIVE DUTY OF FAIR REPRESENTATION LAW. THUS, CONTRARY TO THE SUGGESTION OF THE SOLICITOR GENERAL, THERE IS NO REASON TO DEFER TO THE FLRA IN DUTY OF FAIR REPRESENTATION CASES.

The Solicitor General contends that the courts should defer to the FLRA in its handling of duty of fair representation cases based on the premise that FLRA is more familiar with reviewing arbitration awards. Citing a policy of "avoidance of conflicting rules and reliance on administrative expertise," the Solicitor General asserts that Congress intended to eliminate federal court jurisdiction over duty of fair representation claims. *See* Brief of the United States, pp. 15-16. This argument is defective.

The Solicitor General ignores the fact that this exact argument was made and specifically rejected in *Vaca*. 386 U.S. at 180-81. The Solicitor General has advanced no reason to depart from *Vaca*'s rationale in this case. The courts, not the FLRA, have created, developed and refined the contours of the duty of fair representation for

the forty years since *Steele* was decided. The courts, not the administrative agencies, have always had primacy in developing the substantive body of duty of fair representation law. *See National Treasury Employees Union v. FLRA*, 800 F.2d at 1169-71 (court of appeals overturns FLRA departure from established duty of fair representation law). Nothing in the CSRA changed this. While Congress may have intended that the courts defer to the FLRA on issues within its administrative expertise, *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. at 97-98, Congress never evinced any intent to have the FLRA create a new, different, or primary body of substantive duty of fair representation law for the federal sector.

Indeed, at least one court of appeals has indicated that Congress' silence on such an important matter demonstrates congressional adoption in the CSRA of the private sector precedent which had arisen under the NLRA and RLA. *National Treasury Employees Union v. FLRA*, 800 F.2d at 1171 ("... if Congress were changing rather than adopting a well-known body of case law, one would expect mention of that intention somewhere in the legislative history .... we are aware of, nothing of that sort."). *See also Pham*, 799 F.2d at 638-39. Thus, contrary to the position advanced by the Solicitor General, this Court should not create in the CSRA an exception to over forty years of precedent concerning judicial enforcement of the duty of fair representation, particularly where Congress has given no affirmative guidance on the issue.

Moreover, while the Solicitor General asserts that the FLRA has been particularly active in providing remedies for duty of fair representation cases (Brief of the United States, p. 15), others have criticized the FLRA for not enforcing the duty of fair representation vigorously enough. Broida, *Fair Representation for Federal Employees: An Overview*, 30 FED. BAR NEWS & J. 440, 442 (1983). Certainly in this case, where there were *three* separate breaches of the duty of fair representation, but no attempt by the FLRA to consider the harm done to the individual employee, it would seem that the FLRA's efforts fell well short of the mark set by this Court in *Vaca* and *Bowen* ("Of paramount importance is the right of the employee ... to be made whole.") *Bowen*, 459 U.S. at 222.

Finally, the Solicitor General argues that the CSRA's grant of exclusive representation powers to the union does not deprive the employee of any substantial pre-existing rights. Brief of the United States, p. 16. The Solicitor General is in error. By incorporating the NLRA model in the CSRA, Congress reduced or eliminated traditional individual employee civil service appeal rights and made an explicit commitment to protecting unionized federal workers through their exclusive bargaining representative. H.R. CONF. REP. NO. 1717 at 157; S. REP. NO. 969 at 10; 5 U.S.C. § 7121(a)(1); *Espenschied v. MSPB*, 804 F.2d 1233, 1236 (Fed. Cir. 1986), *cert. denied*, 107 S. Ct. 1896 (1987); *Moreno v. MSPB*, 728 F.2d 499, 500 (Fed. Cir. 1983). As this Court has noted, "[a] leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action . . . " *United States v. Fausto*, 108 S. Ct. at 671, *citing* S. REP. NO. 969 at 3. Moreover, the legislative history indicates that the NLRA model of greater union power over federal labor relations was a direct result of Congress' concern for effective govern-

ment. *E.g.*, Message of Pres. Carter on Civil Service Reform, March 2, 1978, H.R. REP. NO. 1403 at 102; S. REP. NO. 969 at 12. This increased union role was touted as being "more efficient, less time consuming and less formal than the statutory appeals system." 124 CONG. REC. H8468 (daily ed. Aug. 11, 1978) (remarks of Rep. Ford).

Further efficiency and a business-like approach was intended to be gained in this process by having the union serve as a screen for frivolous or non-meritorious employee grievances and appeals. However, this plenary power of the unions over the grievance and arbitration mechanism led the Court in *Vaca* to mandate court jurisdiction over fair representation claims in the private sector. As this Court stated in *Vaca*: "[w]e cannot believe that Congress in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract." 386 U.S. at 186. Since federal employee labor organizations fulfill the same function as in the private sector, the CSRA necessarily contains the corresponding requirement of a judicially enforced duty of fair representation.

CONCLUSION

This Court should not depart from its reasoning in *Steele* and *Vaca*. When the exclusive representation process breaks down in the federal sector, and the exclusive representative breaches its duty of fair representation to the employee not just once, but on three separate occasions, and the FLRA settles the case with the union

without providing a remedy for the employee, the employee should not be left remediless. The doors to the federal courthouse should not be barred to him, any more than to the plaintiffs in *Steele*, *Vaca*, or *Bowen*.

Congress intended no different result. Congress' silence on duty of fair representation issues should not be read as an implied repeal of the holdings in *Steele* and *Vaca*. If Congress had intended to create an exception to this forty-year line of critical precedent, some discussion would have ensued.

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed, and the case remanded for determination of the merits of the appeals and cross-appeals.

Respectfully submitted,

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STATUTORY APPENDIX

5 U.S.C. § 7114. Representation rights and duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

* * * *

5 U.S.C. § 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in

the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or non-preferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure—

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

(e) The expression of any personal view, argument, opinion or the making of any statement which—

(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

(2) corrects the record with respect to any false or misleading statement made by any person, or

(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

* * * *

5 U.S.C. § 7118. Prevention of unfair labor practices

(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

(2) Any complaint under paragraph (1) of this subsection shall contain a notice—

(A) of the charge;

(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

(C) of the time and place fixed for the hearing.

(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

(4)(A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of—

(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period, the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order—

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of an employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

(8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

(b) In connection with any matter before the Authority in any proceeding under this section, the Authority may request, in accordance with the provisions of section 7105(i) of this title, from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or other policy directives issued by the Office of Personnel Management.

* * * *

5 U.S.C. § 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its

designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.